IN THE SUPREME COURT OF THE UNITED STATES

NO. 78-6891

FREDDIE F. DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

DEPARTMENT OF LAW
STATE OF GEORGIA
ARTHUR K. BOLTON
ATTORNEY GENERAL

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QUESTIONS PRESENTED

1.

Did the trial court's instructions during sentencing fail to convey to the jurors all of the various mitigating factors?

2.

Was Petitioner adequately advised of his constitutional rights prior to his later giving an incriminatory statement?

3.

Does the Supreme Court of Georgia's appellate review of Petitioner's death sentence comply with its statutory obligation under Georgia law?

4.

Does the submission of an additional statutory aggravating circumstance on a new trial for sentencing constitute double jeopardy?

STATEMENT OF THE CASE

Freddie Davis, hereinafter referred to as the Petitioner, is under a sentence of death in the State of Georgia following his conviction in the Superior Court of Meriwether County in 1977, for the murder of Francis Coe in January of 1977. As a result of his conviction in 1977, an appeal was taken to the Supreme Court of Georgia. The Supreme Court of Georgia upheld Petitioner's conviction, but granted him a new trial as to sentencing because the Court found that the jurors had not been adequately instructed during the sentencing phase, in that the trial judge should have told the jurors that even though they found beyond a reasonable doubt the existence of any of the statutory aggravating circumstances put forth by the State, that they could nevertheless still impose a life sentence. Davis v. State, 240 Ga. 763, 767, 243 S.E.2d 12 (1978).[1/] Later a new jury for resentencing was selected, and after being presented with the same evidence which the State presented earlier in 1977, that jury sentenced Petitioner to death for the murder of Ms. Coe. The Supreme Court of Georgia on appeal affirmed that sentence. Davis v. State, 243 Ga. 901, ___ S.E.2d ___ (1979). This Court on May 1, 1979, in an order by Justice Powell, extended the period of time in which the Petitioner could file for a writ of certiorari.

1/ Petitioner's co-defendant also received the death penalty, but his sentence to death was likewise vacated for the same reason as Petitioner. Spraggins v. State, 240 Ga. 759, 243 S.E.2d 20 (1978). Following a new trial for sentencing, co-defendant Spraggins received a death sentence again. Spraggins v. State, 243 Ga. 73, ___ S.E.2d ___ (1979); Petition for Certiorari No. 78-78, presently pending before this Court.

STATEMENT OF THE FACTS

Around 1:30 p.m. on the snowy afternoon of January 31, 1977, Elsie Hutchinson thought it rather unusual that the back door to the home of her Meriwether County, Georgia, neighbor Francis Coe, was opened. Upon entering her neighbor's house Ms. Hutchinson discovered the gruesome sight of her neighbor lying on her bed. Ms. Hutchison immediately left and went across to a neighbor's home to have the police called.

Georgia Bureau of Investigation Officer Bert Davis described the condition of the murder victim as follows:

> "On the bed on the right, Ms. Coe was lying with her head in the direction of the wall, and her feet down onto the floor. She was in a semi-nude condition, panties and pantyhose had been pulled down and were still attached to the left foot. She wore a slip which was pulled up here in the area of the breast and had on a green sweater which was open. There were numerous lacerations to the throat. It was cut just practically out. Further examination revealed a deep cut here in her eye which appeared to be a bruise type cut and not a slash. Numerous stab marks and slashes in the chest area and a slash mark on her breast, slash marks in the abdomen area on the left side, one approximately 5 inches. From the top of the vagina up through the navel, Ms. Coe was split open. The intestines were pulled from the stomach and lying on top of her stomach."

The autopsy which was later performed revealed that the cause of death was due to a loss of blood. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. There was also evidence that there had been some manipulation to the victim's sexual organs. Particularly, there were two areas of injury in the vicinity of the vaginal opening. The second injury consisted of bruising around the vaginal orifice. The autopsy further indicated that there was a considerable amount of hemorrhaging around the urethera, as well as there being a small tear in the vaginal orifice.

During the course of the investigation the law enforcement officers were led to the yard of Eddie Spraggins' residence. A search of Spraggins' yard was occasioned by virtue of the fact that a neighbor on the night of the murder had seen something burning in Spraggins' back yard. With the consent of Spraggins' mother the law enforcement officers uncovered from a pile of ashes a zipper and cloth material which appeared to come from a jacket, as well as a flashlight which had recently been borrowed from the victim.

A Georgia Bureau of Investigation Agent later confronted Spraggins with the evidence which he had gathered to date on Ms. Coe's murder. After being advised of his rights Spraggins gave a statement. In that statement Spraggins implicated Petitioner by stating that Petitioner went to Francis Coe's house on Sunday, January 30, 1977. Spraggins stated that he had been talking about robbing Ms. Coe for sometime. Spraggins went to the front door of the Coe residence while Petitioner remained at the back door. To gain entrance into Ms. Coe's house

Spraggins used the excuse that he wanted to use the telephone. Upon gaining entrance to the house Spraggins forced Ms. Coe to open the back door, but she refused and started to scream. Spraggins proceeded to grab Ms. Coe from around the neck and opened the door in order to let Petitioner in. Spraggins then drug Ms. Coe to the bedroom while at the same time keeping his hand over her mouth to keep her from screaming. Petitioner then told Spraggins to "Shut her up." In making this remark Petitioner handed Spraggins a knife, following which Spraggins proceeded to stab Ms. Coe as well as to cut her throat. Spraggins told the officer that Ms. Coe would not die, and that he kept cutting her, with Petitioner saying, "You got to finish her off." After eventually subduing Ms. Coe, Spraggins said that he wiped the blood off his hands and gave Petitioner back his knife. Petitioner then used the victim's flashlight in order to look for money. Spraggins later burned the windbreaker he was wearing behind his house. Petitioner returned the flashlight to Spraggins after he and Spraggins had left Ms. Coe's house.

REASONS FOR NOT GRANTING THE WRIT

A. THE TRIAL COURT'S INSTRUCTIONS DURING THE SENTENCING PHASE OF THE TRIAL DO NOT SUFFER FROM ANY CONSTITUTIONAL DEFICIENCY AS URGED BY THE PETITIONER.

The Petitioner's first trial was specifically set aside because the trial judge failed to inform the jurors that even if they found the existence of a statutory aggravating circumstance they could nevertheless impose the death penalty and further, because the jury had not been instructed that they could consider mitigating circumstances in determining whether or not to impose the death penalty. Davis v. State, 240 Ga. 763, 767 (1978). Now the Petitioner argues that the sentencing instructions were defective in that the Court did not spell out the fact that the jurors were to consider the particular characteristics of the accused. This Court has long stated that instructions should be viewed as a whole as they will not be judged in artificial isolation. Cupp v. Naughten, 414 U.S. 141 (1973). The Georgia statute unlike the statutes in Woodson v. North Carolina, 428 U.S. 280 (1976), and in Lockett v. Ohio, 438 U.S.586 (1978), do not suffer from the constitutional deficiencies of having a jury impose the death penalty without considering mitigating circumstances, or limiting the mitigating circumstances. To the contrary, in Georgia the trial court fully informs the jurors that they may consider any mitigating factors, the decision as to what constitutes a mitigating factor or circumstances being left to the jurors. The Supreme Court of Georgia has made it clear that the trial court does not have to spell out what constitutes a mitigating circumstance, since the jurors are free in their own discretion to make that decision.

See, Potts v. State, 241 Ga. 67, 243 S.E.2d 510 (1978); Spivey v. State, 241 Ga. 477 246 S.E.2d 28[illegible] (1978); Thomas v. State, 240 Ga. 393,242 S.E.2d 1 (1978). Sub judice, the jurors were given a full opportunity to consider mitigating circumstances which would include their consideration on any aspects of the Petitioner's character and record that they so desired.

The Petitioner also complains about the fact that the mitigating circumstances were not sufficiently defined or that examples of mitigating circumstances were not provided. As noted above, the Supreme Court of Georgia has held that it is not necessary for the trial court to specify or single out for the jurors what might be considered as a mitigating circumstance, since to do so might place a limitation on the jurors' discretion as to what they were to consider as a mitigating circumstance. If the Court were to spell out what the mitigating circumstances were in a particular case, then the petitioner would come back and state that the jurors had been unnecessarily limited to those mitigating circumstances, stating that there may have been others and giving examples of those. Clearly, the better practice, and the practice in Georgia, is for the Court to inform the jurors that they may consider mitigating circumstances, and to define mitigating circumstances as being those circumstances which do not constitute a justification or excuse for the crime but which may be considered as extenuating or reducing the moral culpability or blame on the accused. The trial court's instruction on mitigation in this instance was clearly sufficient, and since the term mitigating circumstance was defined, no further elaboration was required because the word mitigating is a common term within a juror's understanding. See, United States v. Beasley, 519 F.2d 233 (5th Cir. 1975), rehng. den., 522 F.2d 1280 (5th Cir. 1976).

Also without merit is the Petitioner's contention that the trial judge used the word "recommend" to the jurors during the sentencing phase of the trial, with the Petitioner contending that this may have relieved them of their responsibility believing that their decision would not be a final decision. The trial jury was not erroneously led to believe that the trial judge would be the final decider, since the court's instruction as a whole, and the arguments of both the State's attorney and the Petitioner's attorney clearly showed that the responsibility of making a decision as to what sentence should be imposed rested squarely with the jury.

For these reasons the petition for a writ of certiorari should be denied.

B. IT WAS NOT ERROR DURING THE PETITIONER'S TRIAL TO ALLOW TESTIMONY CONCERNING TWO NON-CUSTODIAL INTERVIEWS WITH THE PETITIONER, AND A THIRD INTERVIEW WHICH RESULTED IN AN INCRIMINATORY STATEMENT FOLLOWING A TIME WHEN THE PETITIONER HAD BEEN FULLY ADVISED OF HIS CONSTITUTIONAL RIGHTS.

The Petitioner urges this Court to grant his petition for writ of certiorari by contending that the evidence surrounding three interviews with him was improper when warnings under Miranda v. Arizona, 384 U.S. 436 (1966), were not provided to him by various law enforcement officers. Petitioner is in error in this regard, since this assertion fails to take into account that there were two earlier interviews with the Petitioner which occurred in a non-custodial setting. That is, the first interview occurred in the Petitioner's home, and at that time the focus of the investigation was not on the Petitioner, nor was the Petitioner placed in custody or deprived of his freedom of movement in any significant way. The questioning of the Petitioner at his home was investigative, and not custodial, and consequently the law enforcement officers were not required to read the Petitioner his constitutional rights under Miranda v. Arizona, supra. See, United States v. Hall, 493 F.2d 904 (5th Cir. 1974), cert. den., 422 U.S. 1044 (1975); United States v. Lacy, 446 F.2d 511 (5th Cir. 1971).

The second questioning of the Petitioner was at the offices of the investigating law enforcement officers, but again the questioning was investigative, and not custodial; and Petitioner was free to leave at any time. Oregon v. Mathiason, 429 U.S. 492 (1977). The fact that the investigation may have focused on the

Petitioner alone did not require a reading of his constitutional rights, for the requirements of Miranda, supra, only come into play when the focus of the investigation is upon the accused, plus there is a custodial interrogation in which questioning is initiated by the law enforcement officers after the person is in custody, and that individual is deprived of his freedom in a significant way. Oregon v. Mathiason, supra; United States v. Bastone, 526 F.2d 971 (7th Cir. 1975); U. S. v. Carollo, 507 F.2d 50 (5th Cir. 1975), rehng. den., 510 F.2d 1407 (5th Cir.1975), cert. den., 423 U.S. 874 (1975). Consequently, the first two periods of questioning with the Petitioner did not require the reading of his Miranda, supra rights.

During the third interview with the Petitioner his Miranda rights were afforded to him, and following that an incriminatory statement resulted. The trial judge at a hearing held pursuant to the provisions of Jackson v. Denno, 378 U.S. 368 (1964), found that the statements were voluntarily made, and that the Petitioner in making those statements had been aware of his right to remain silent, his right to counsel, and that anything he said could and would be used against him. The evidence presented by the State during that hearing unequivocally established the voluntariness of Petitioner's incriminatory extra judicial statements by a preponderance of the evidence. Leggo v. Twomey, 404 U.S. 477 (1972).

For this reason the petition for a writ of certiorari should be denied.

C. THE SUPREME COURT OF GEORGIA HAS NOT ABANDONED ITS APPELLATE REVIEW PROCESS WHICH THIS COURT APPROVED OF IN GREGG[2/] NOR HAS IT PERMITTED ONE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES UPON WHICH THE PETITIONER WAS SENTENCED TO DEATH TO BECOME A "CATCHALL."

The jury during the Petitioner's resentencing trial found that the Petitioner should be sentenced to death in that his crime encompassed two statutory aggravating circumstances contained in Georgia Laws 1973, pp. 159, 163; Ga. Code Ann. § 27-2534.1(2)(7).[3/]

The Petitioner states that the seventh aggravating circumstance, namely the offense of murder, was outrageously and wantonly vile, horrible and inhumane in that it involved a torture and depravity of mind on the part of the defendant or an aggravated battery to the victim is unconstitutional in that it has not been narrowly applied by the Supreme Court of Georgia, and as such is a catchall statutory aggravating circumstance.

Respondent submits that the germane issue in this matter is whether the Petitioner's sentence to death under the statutory aggravating circumstance is warranted by the evidence prior to any consideration being given to whether or not the Supreme Court of Georgia has not limited the application of this statutory aggravating circumstance. Based upon the statement of facts which is in the first portion of this brief, it cannot be said that under the circumstances of this case (the facts are so horrifying) that the murder was not outrageously and wantonly vile, horrible

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2/ Gregg v. Georgia, 428 U.S. 156 (1976).

3/ Petitioner in his brief at page 19 states that the death penalty was imposed only on one statutory aggravating circumstance. Such is not the case.

and inhumane, or that it did not involve the torture and depravity of mind on the part of the defendant or an aggravated battery to the victim. Clearly, the cutting open of the abdominal area of the rape victim, causing to be exposed the visceral organs contained therein offends anyone's sense of decency, and clearly exhibits a deparvity of mind on the part of the Petitioner, as well as an aggravated battery to the victim. Furthermore, the cases in which this statutory aggravating circumstance has been considered by the Georgia Supreme Court have been carefully reviewed and there are no cases in which the Supreme Court of Georgia has permitted this seventh statutory aggravating circumstance to become a general receptacle for upholding the death penalty. On the basis of the facts in this case the evidence was so clear and convincing that there was no necessity or a requirement that the jurors be informed as to what constituted torture, depravity of mind or an aggravated battery, since the evidence clearly established all of the requirements as contained in the seventh statutory aggravating circumstance. The facts in this case do not lead to the conclusion that the jurors were given unbridled discretion, since the facts were so wantonly vile that they almost defy description.

Lastly, the Supreme Court of Georgia has not abandoned its appellate role in considering similar cases in determining "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 27-2537(c)(3).

Furthermore, the appendix of cases considered by the Supreme Court of Georgia in carrying out its appellate statutory review function clearly demonstrates that in the six years since the revised

death penalty was invoked in Georgia that they are considering cases of like circumstances wherein the death penalty for a similar statutory aggravating circumstance has been imposed. The conclusory allegations made by the Petitioner simply fail to establish that the Supreme Court of Georgia is not carrying out the review function which this Court earlier reviewed in Gregg v. Georgia, 428 U.S. 153 (1976), a procedure which was created and established by the General Assembly of Georgia.

The Petitioner's contentions surrounding the appellate review process in Georgia fail to demonstrate that certiorari in regard to the Petitioner's case is warranted.

D. THE SUBMISSION AT A RETRIAL FOR SENTENCING OF AN ADDITIONAL STATUTORY CIRCUMSTANCE DOES NOT CONSTITUTE DOUBLE JEOPARDY.

The Petitioner as noted earlier was granted a new trial on sentencing by the Supreme Court of Georgia. In the first trial the District Attorney submitted for the jurors' consideration the statutory aggravating circumstance that the murder was committed while the Petitioner was engaged in the commission of another capital felony, that being rape. Ga. Code Ann. § 27-2534.1(2). At the resentencing trial the seventh statutory aggravating circumstance, namely that the offense of murder was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim was also included for the jurors' consideration. Petitioner argues that this constitutes double jeopardy, in that he was not on notice as to that circumstance at the first trial, and as such the State should be precluded from putting forth an additional statutory aggravating circumstance based upon the same evidence at a subsequent trial for resentencing. The Supreme Court of Georgia found that double jeopardy was not involved, since the evidence at the first trial was identical to that which was presented in the second trial, and consequently the Petitioner was on notice since the evidence was the same as that in the first trial. Davis v. State, supra.

Petitioner's double jeopardy theory seems to be that since the jurors in the first trial were not asked to consider the seventh statutory aggravating circumstance, that in essence the failure to submit that statutory aggravating circumstance at his first trial constitutes an acquittal thereof. Since the first circumstance was not submitted to the jury it cannot be said

that he was acquitted thereof, and as such the double jeopardy argument must fail. Petitioner relies upon the case of Ashe v. Swinson, 397 U.S. 436 (1970), in support of his double jeopardy provision. Ashe, supra, is inapplicable in that, in that case the petitioner was charged with six counts of armed robbery arising out of one transaction or occurrence. There the jury acquitted on one count, and as such the State was constitutionally prohibited from relitigating the issue again as to other robbery victims. In this case the Petitioner was never made to run the gauntlet of having a jury consider the seventh statutory aggravating circumstance.

Neither can it be said that the submission of a second statutory aggravating circumstance at his trial for resentencing was to have a chilling effect as a result of the Petitioner having earlier exercised his appellate rights. This contention has no basis at all, since the Petitioner in Georgia is entitled as a matter of law to an automatic appeal from any conviction in which he receives the death penalty. Ga. Laws 1973, pp. 159-165; Ga. Code Ann. § 27-2537(a).

Neither is there any evidence in this matter to indicate that the District Attorney's action in submitting an additional statutory aggravating circumstance for the jury's consideration constitutes vindictiveness. See, North Carolina v. Pearce, 395 U.S. 711 (1969). Since the Petitioner did not receive a greater sentence on retrial, but received the same sentence he earlier received, his retrial did not subject him to a greater punishment than that which was imposed at the first trial. Further, because the jurors were not called upon to consider the additional statutory aggravating circumstance in the first trial the submission of same on the second trial does not constitute double jeopardy. See, Price v. Georgia, 398 U.S. 323 (1970). See also, Bordenkircher v. Hayes, 434 U.S. 357 (1978).

For these reasons, the submission during the penalty phase at the Petitioner's second trial of a statutory aggravating circumstance not considered at the first trial does not constitute double jeopardy.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served true and correct copies of the Brief for Respondent in Opposition upon the Petitioner's attorney by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Larry D. Woods
Woods, Bryan & Thomas
121 Seventeenth Avenue, South
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This 23rd day of July, 1979

JOHN C. WALDEN